

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ZEFANIA BAUMVOLL	:	DETERMINATION
AS OFFICER OF JAZ SERVICE CENTER, INC.	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1979	:	
through August 31, 1982.	:	

Petitioner, Zefania Baumvoll, as officer of Jaz Service Center, Inc., 1364 East 89th Street, Brooklyn, New York 11236, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through August 31, 1982 (File No. 800731).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 9, 1988 at 1:15 P.M. Petitioner appeared by Gerald I. Steinhaus, Esq. The Audit Division appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether petitioner is a "person required to collect tax" within the meaning of section 1131(1) of the Tax Law who, therefore, would be personally liable for such tax under section 1133(a) of the Tax Law.

FINDINGS OF FACT

1. Jaz Service Center, Inc. ("Jaz") operated a gas station at 2800 Bruckner Boulevard, Bronx, New York which sold "Efco" gas. Jaz acquired the station in 1979 and closed the station in 1982. The station had two service bays. Checks could be signed by any two of the three officers (one of whom was petitioner). The business had an accountant, Nat Roberts, who was hired by Mr. Shamir and Mr. Waide, two of the owners of Jaz.

2. Petitioner, Zefania Baumvoll, came to this country from Israel in 1973. He became a cab driver. In 1979, petitioner invested \$7,000.00 in Jaz Service Center, Inc., a corporation owned by two friends, Ari Shamir and Jacob Waide, who had themselves owned stations before. In 1980, Mr. Waide left the business. On October 12, 1981, petitioner left the business. Also on October 12, 1981 Mr. Shamir, representing the business, agreed to pay petitioner \$180.00 a week to pay off petitioner's investment, which arrangement continued for about six months. The business ceased operations in 1982. Petitioner was required to make payments on a loan of the corporation which he had guaranteed.

3. Petitioner was a full-time cab driver in 1979, 1980 and 1981. He occasionally helped

out at the gas station by pumping gas. He usually drove his cab by the station about once a day. He also occasionally made bank deposits for the business.

4. The Federal income tax return of the corporation for 1980 listed petitioner as one of the officers and indicated his annual compensation as \$14,300.00.

5. Mr. Baumvoll signed some of the sales tax returns of Jaz as secretary of the corporation. These returns were for the five quarterly periods ending May 31, 1980 through May 31, 1981. For other periods, Mr. Shamir signed as president of the corporation. In all cases, the accountant, Nat Roberts, also signed the returns. For at least the last period, no tax was remitted with the return.

6. A test audit had been done for the sales tax quarter ending November 30, 1980. Sun Oil Company had been asked to furnish gallonage information for the station at 2800 Bruckner Boulevard. The station was then in the name of Andrew Caso. The amount delivered was 98,263 gallons. The auditor assumed a selling price of \$1.27 a gallon, which resulted in sales of \$124,794.00. A credit was given against this amount of \$7,861.00 reducing gas sales to \$116,933.00. Since this figure included sales tax, it was divided by 1.08 to arrive at a figure for taxable sales of \$108,271.00, on which a tax was calculated to be due of \$8,662.00. Only \$4,156.00 had been paid with the tax return for that quarter. The tax due divided by the tax paid resulted in a margin of error of 2.0842 which was applied to all sales tax quarters in the audit period.

7. The Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 20, 1983 for the period June 1, 1979 through August 31, 1982, in the amount of \$83,078.78, plus penalty of \$19,127.97 and interest of \$22,391.31, for a total of \$127,598.07. The Division of Taxation has conceded that petitioner is not responsible for the taxes due for the period June 1, 1979 through February 29, 1980 (because of the three-year statute of limitations) and for the period September 1, 1981 through August 31, 1982 (because of petitioner's leaving the business).

CONCLUSIONS OF LAW

A. Petitioner has adequately shown that his role in Jaz Service Center, Inc. was minimal and that he in no way was responsible for the financial or tax affairs of Jaz. It was not he but the full-time active owners who hired the accountant and had financial control. Petitioner had little knowledge of the accounts of Jaz and would not have known of any inadequate reporting of tax. Such considerations are relevant in concluding that petitioner was not a person required to collect such tax under Tax Law § 1131 and so is not liable for such tax under Tax Law § 1133 (see____, Vogel v. New York State Department of Taxation and Finance, 98 Misc 2d 222).

B. The petition of Zefania Baumvoll, officer of Jaz Service Center, Inc., is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1983 is cancelled.

DATED: Albany, New York
November 23, 1988

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE